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9 Attorneys for Defendant CITY OF PETALUMA,  
10 THOMAS SIMMS, as an Individual and in his official capacity  
11 of Chief of Police; OFFICER TODD HART, OFFICER LANCE NOVELLO,  
12 OFFICER TERRY CAMPBELL, OFFICER AARON GARIHAN,  
13 OFFICER GREG SALCEDO, and OFFICER JOHN ANTONIO

14  
15 IN THE UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 RANDALL DEAN RUMERY,

18 Plaintiff,  
19 v.

20 PETALUMA POLICE DEPARTMENT; CITY OF  
21 PETALUMA; THOMAS SIMMS, as an individual  
22 and in his official capacity of Chief of Police;  
23 OFFICER TODD HART, as an individual and in his  
24 official capacity as a member of the Petaluma  
25 Police department; OFFICER LANCE NOVELLO,  
26 as an individual and in his official capacity as a  
27 member of the Petaluma Police department;  
28 OFFICER TERRY CAMPBELL, as an individual  
and in his official capacity as a member of the  
Petaluma Police department; OFFICER AARON  
GARIHAN, as an individual and in his official  
capacity as a member of the Petaluma Police  
department; OFFICER GREG SALCEDO, as an  
individual and in his official capacity as a member  
of the Petaluma Police department; OFFICER  
JOHN ANTONIO, as an individual and in his official  
capacity as a member of the Petaluma Police  
department; MARY JANE WERNET, an individual;  
MERIDIAN CAL-COMP dba CAL COMP  
SPECIALISTS, INC, a California Corporation; and  
DOES 1 through 100,

Defendants.

Case No.: C 04-03718 SBA

**DEFENDANT CITY OF  
PETALUMA'S MOTION TO  
DISMISS, OR ALTERNATIVELY,  
MOTION FOR A MORE DEFINITE  
STATEMENT  
[Rule 12(b)(6) and 12(e)]**

State Court Complaint Filed: July 2, 2004  
Service Effective: August 26, 2004

Date: November 9, 2004  
Time: 1:00 p.m.  
Courtroom: 3, 3<sup>rd</sup> Floor

1      **I. NOTICE OF MOTION**

2            TO RANDALL DEAN RUMERY AND HIS ATTORNEY OF RECORD: Please  
3 take notice that on November 9, 2004, at the hour of 1:00 p.m., or as soon thereafter as  
4 the matter can be heard in Courtroom 3, 3<sup>rd</sup> Floor of this Court, located at 1301 Clay  
5 Street, Oakland, California, the CITY OF PETALUMA, THOMAS SIMMS, OFFICER  
6 TODD HART, OFFICER LANCE NOVELLO, OFFICER TERRY CAMPBELL, OFFICER  
7 AARON GARIHAN, OFFICER GREG SALCEDO, and OFFICER JOHN ANTONIO,  
8 defendants, will move this Court to dismiss plaintiff's Complaint.

9            Defendants' motion is based upon this Notice of Motion, Motion, and  
10 Memorandum of Points and Authorities, the pleadings and papers on file in this action, and  
11 upon such other and further matters as the Court may consider at the hearing of this  
12 motion.

13      **II. RELIEF SOUGHT**

14            Defendants seek dismissal of plaintiff's Complaint under Federal Rule of Civil  
15 Procedure 12(b)(6), because it fails to state a claim upon which relief can be granted.  
16 Plaintiff purports to sue the City and its officers under 42 U.S.C. Section 1983 for  
17 unspecified violations of his "clearly established rights guaranteed by the United States  
18 Constitution." Plaintiff fails to plead his federal constitutional claims with any specificity  
19 whatsoever. The Defendants are at a loss as to how to respond. Moreover, as plaintiff  
20 has chosen to sue a public entity and public employees, there are various immunities from  
21 suit which at present, the City and its officers are unable to evaluate and assert. Because  
22 plaintiff's federal constitutional claims are defective, his Complaint should be dismissed.  
23 Alternatively, the defendants seek relief pursuant to Federal Rule of Civil Procedure 12(e)  
24 and plaintiff should be made to file an amended Complaint, as his federal claims in their  
25 current form are impermissibly vague, to such a degree that the defendants are deprived  
26 of drafting an intelligent responsive pleading.

27            Moreover, plaintiff's state law claims are fatally flawed. Plaintiff failed to comply with  
28 the California Tort Claims Act in timely filing his lawsuit upon receipt of his claims rejection.

1 As such, his state law claims are jurisdictionally barred and the Court should dismiss them  
2 with prejudice.

3 **III. INTRODUCTION**

4 Plaintiff Randall Dean Rumery has filed a Complaint which ostensibly alleges seven  
5 causes of action against the City and its officers: (1) Federal Civil Rights violations  
6 pursuant to Section 1983, (2) California Civil Rights Violations pursuant to Unruh; (3)  
7 Battery; (4) Assault; (5) Intentional Infliction of Emotional Distress; (6) Negligent Infliction of  
8 Emotional Distress; and (7) Conversion.

9 After alluding to jumping off a bridge, plaintiff was picked up under Welfare &  
10 Institutions Code §5150 for psychiatric evaluation. Plaintiff's sole federal cause of action  
11 therefore appears to stem from his detention under Wel. & Inst. Code §5150 on June 26,  
12 2003. Plaintiff claims that the City's officers used excessive force when they detained him.  
13 He bases his federal cause of action on 42 U.S.C. Section 1983. He fails, however, to  
14 identify a single federal constitutional provision applicable to his claim. Accordingly, the  
15 City defendants are at a loss as to how to respond. Plaintiff's Section 1983 claim should  
16 either be dismissed, or he should be made to amend it so that the City defendants may file  
17 a coherent and intelligent response.

18 Additionally, plaintiff appears to impermissibly hold the City liable for the acts of its  
19 employees pursuant to Section 1983. This he may not do. Plaintiff has failed whatsoever  
20 to allege a viable *Monell* claim. Again, his Section 1983 claim should either be dismissed,  
21 or he should be made to amend it to remove the impermissible *respondeat superior* claim  
22 against the City.

23 Finally, plaintiff has pled five state law claims against the City defendants. In  
24 California, a plaintiff filing a suit for money or damages must file a tort claim pursuant to  
25 California Government Code §900 *et seq.* Public entities, in turn, are required to act upon  
26 the claim within 45 days, or else the claim is deemed rejected by operation of law. Once a  
27 claim has been rejected, the claimant has six months within which to file suit. Here,  
28 plaintiff did indeed file a tort claim, as alleged in his complaint, on December 11, 2003.

1 This claim, however, was rejected on December 22, 2003. Plaintiffs complaint must  
2 therefore have been filed within 6 months, or no later than June 22, 2003. Plaintiff did not  
3 file his complaint in this matter until July 2, 2004. He has thus failed to timely file his  
4 lawsuit upon receipt of the rejection of his tort claim. Because plaintiff has failed to comply  
5 with the California Tort Claims Act, he is jurisdictionally barred from pursuing his state law  
6 claims, and thus, these claims must be dismissed with prejudice.

7 **IV. STATEMENT OF FACTS**

8 In his complaint plaintiff alleges that on June 26, 2003, he was discussing his  
9 workers' compensation claim with Meridian Cal-Comp representative Mary Jane Wernet.  
10 During this phone call, plaintiff said that he was "ready to go to the bridge" and "end it all."  
11 (Complaint, ¶17.) Plaintiff also informed Ms. Wernet that he had just finished cleaning two  
12 guns. Plaintiff alleges that he further told Ms. Wernet that he was not suicidal, when  
13 questioned by her.

14 When Ms. Wernet hung up with plaintiff, she discussed her call with a supervisor.  
15 She then phoned the police to inform them of the substance of her conversation.  
16 Petaluma police officers responded to plaintiff's address and talked him out of his house.  
17 Plaintiff was placed in the back seat of a police cruiser and then taken to Petaluma Valley  
18 Hospital via ambulance after complaining of chest pains. Once he was medically cleared,  
19 he was transported to Oakcrest Psychiatric Emergency Services for evaluation and  
20 eventually released.

21 **V. ISSUES PRESENTED**

22 1. Plaintiff's federal cause of action based upon 42 U.S.C. Section 1983 fails  
23 to cite to any textual source as a basis for the alleged violation of any of his rights.  
24 Because of his failure to plead with specificity, his Section 1983 cause of action should be  
25 dismissed, or, alternatively, plaintiff must file an amended complaint which corrects these  
26 defects.

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1           2. Plaintiff's federal cause of action appears to be an impermissible  
2 *respondeat superior* claim against the City. Accordingly, his Section 1983 claim against  
3 the City must be dismissed. Alternatively, defendants request that plaintiff be made to  
4 amend his claim to include the required specific allegations.

5           3. Plaintiff's state law claims must be dismissed with prejudice because he failed to  
6 timely file his lawsuit within six months of receiving his claim rejection. Plaintiff is thus  
7 jurisdictionally barred from pursuing any state law claims against all of the City defendants.

8 **VI. ARGUMENT**

9           **A. The Complaint Fails to State a Claim for Which Relief Can Be Granted  
10 Under 42 U.S.C. Section 1983.**

11           Plaintiff's First Cause of Action purports to be one brought pursuant to 42 U.S.C.  
12 Section 1983, among other theories. Under FRCP Rule 12(b)(6), a pleading will not be  
13 sufficient to state a claim under the Civil Rights Act if the allegations are stated as mere  
14 conclusions. (*Sherman v. Yaki* (9<sup>th</sup> Cir. 1977) 549 F.2d 1287, 1290, citations omitted.)  
15 Additionally, the plaintiff must identify the civil rights allegedly violated in his complaint.  
16 (*Id.*) Vague and conclusory allegations of official participation in civil rights violations are  
17 not sufficient to withstand a motion to dismiss. (*Ivey v. Board of Regents* (9<sup>th</sup> Cir. 1982)  
18 673 F.2d 266, 268, citations omitted.) The complaint alleging civil rights violations must  
19 also make clear connections between specific allegations and individual defendants.  
20 (*McHenry v. Renne* (9<sup>th</sup> Cir. 1996) 84 F.3d 1172, 1178.)

21           Here plaintiff apparently brings a federal claim as set forth in his "First Cause of  
22 Action" for a violation of his "clearly established rights guaranteed by the United States  
23 Constitution and the California Civil Code, which includes freedom from unreasonable and  
24 excessive force and freedom from intimidation." (Complaint, ¶ 26.) Plaintiff, however,  
25 makes only conclusory allegations in the First Cause of Action regarding a violation of his  
26 civil rights, and does not plead facts sufficient to support his claims of civil rights violations.

27           "Where a particular amendment 'provides an explicit textual source of  
28 constitutional protection' against a particular sort of government behavior, 'that

1 Amendment, not the more generalized notion of "substantive due process," must be the  
2 guide for analyzing these claims." (*Albright v. Oliver* (1994) 510 U.S. 266, 273 (quoting  
3 *Graham v. Connor*, (1989) 490 U.S. 386, 394.) In *Graham*, the Supreme Court held that  
4 claims brought under Section 1983 must be analyzed under the attendant explicit textual  
5 sources of constitutional protection. (*Graham*, 490 U.S. at 394-95.)

6 Plaintiff in the case at bar merely cites Section 1983 and references his "clearly  
7 established rights guaranteed by the United States Constitution." Case law makes clear  
8 that a plaintiff may not proceed under Section 1983 without articulating (with non-  
9 conclusory factual allegations) in his complaint how a particular defendant interfered with a  
10 particular right which that plaintiff did or should have possessed. Merely claiming that a  
11 violation of his constitutional rights occurred under Section 1983 is woefully inadequate.  
12 Accordingly, plaintiff's First Cause of Action premised solely upon Section 1983 must be  
13 dismissed.

14       **B. The Complaint Fails to State a Valid Cause of Action For Municipal  
15           Liability.**

16       **1. Plaintiff Cannot Hold the City, Chief Simms and the City's named  
17           Officers Liable Under § 1983 Based on Respondeat Superior.**

18       The "First Cause of Action" in the Complaint additionally seeks to hold the City of  
19 Petaluma , as well as the named officers ("municipal defendants") liable for the unspecified  
20 acts of these officers. But the Complaint provides no facts to substantiate plaintiff's claims  
21 against the municipal defendants. Instead, they throw out conclusory phrases like "acting  
22 under the color of state law" (Complaint ¶ 25) in the hope that they can pass muster. They  
23 cannot. What Plaintiff attempts is to hold the municipal defendants liable under the  
24 impermissible theory of *respondent superior*.

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a. Under Section 1983, Municipalities Are Not Vicariously Liable For the Constitutional Torts of Their Employees

Assuming that plaintiff is attempting to assert that the municipal defendants used excessive force in arresting him, he fails to state a claim against the City . No plaintiff can impose liability upon a municipality for its employee's violation of a plaintiff's constitutional rights under § 1983.

"In *Monell*, . . . the [Supreme] Court made clear that the municipality itself must cause the constitutional deprivation and that a city may not be held vicariously liable for the unconstitutional acts of its employees under the theory of *respondeat superior*." (*Gillette v. Delmore*, (9<sup>th</sup> Cir. 1992) 979 F.2d 1342, 1346 (citing *Monell v. New York City Dep't of Social Servs.* (1978) 436 U.S. 658, 690).) The Supreme Court based its holding on the fact that "[C]ongress did not intend to impose vicarious liability on municipalities under Section 1983 . . ." (*Medrano v. City of Los Angeles* (9<sup>th</sup> Cir. 1992) 973 F.2d 1499, 1505 citing *Moor v. County of Alameda* (1973) 411 U.S. 693, 710, 93 S.Ct. 1785).)

b. Plaintiff's Complaint Fails to Articulate the "Custom, Policy or Practice" by the municipal defendants which deprived him of his Constitutional Rights

To state a valid claim for municipal liability, a complaint must not only allege a constitutional violation caused by the municipality, but must also allege either: (1) that the violation occurred pursuant to a formal governmental policy or longstanding practice or custom which constitutes the standard operating procedure of the local government entity; or (2) that an official with final policy making authority committed or ratified the constitutional tort. (*Gillette, supra*, 979 F.2d at 1346-47.)

Dismissal of a section 1983 municipal liability cause of action is appropriate where a plaintiff “[a]lleged no facts which suggested that the alleged constitutional deprivation occurred as the result of [a] policy or custom.” (*Thompson v. City of Los Angeles* (9<sup>th</sup> Cir. 1989) 885 F.2d 1439, 1444).

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III

1       Here, the Complaint in conclusory fashion alleges that the municipal defendants  
2 “used excessive force upon the plaintiff by throwing him to the ground unnecessarily and  
3 not for the purpose of maintaining security but rather for the purpose of causing pain.”  
4 (Complaint ¶ 25).

5       Plaintiff does not allege any facts to support his bald assertion nor does he specify  
6 the acts of misconduct which provide the basis for these polices customs or practices.  
7 Instead we are left to speculate. Simply put, neither a municipality nor its policymakers or  
8 supervisors can be held liable for a pattern and practice violation if the conduct of the  
9 underlying officer was constitutional. (*City of Los Angeles v. Heller* (1986) 475 U.S. 796.)

10       The only conduct at issue is plaintiff’s apparent charge that the municipal  
11 defendants used excessive force on one particular date without cause. The actions of the  
12 municipal defendants on one day are not sufficient to establish a “widespread practice that  
13 . . . is so permanent and well settled as to constitute a ‘custom or usage’ with the force of  
14 law.” (*Gillette, supra*, 979 F.2d at 1348-49 (*quoting City of St. Louis v. Praprotnik* 485 U.S.  
15 112, 127 (1989) (plurality opinion)).)

16        “[A] single incident alleged in a complaint, especially if it involved only actors  
17 below the policy making level, does not suffice to show a municipal policy.”  
(*Ibid.*)

18       What is the widespread policy or practice that is supposed to be at issue here? The  
19 Complaint does not say. Instead the Complaint alleges facts supporting only a single  
20 incident by actors below the policy making level, which does not suffice to show a  
21 municipal policy or custom. Conclusory allegations, unsupported by facts, will be rejected  
22 as insufficient to state a claim under the Civil Rights Act. (*Price v. State of Hawaii* (9<sup>th</sup> Cir.  
23 1991) 939 F.2d 702, 707-08 (*quoting Jones v. Community Redevelopment Agency* (9<sup>th</sup> Cir.  
24 1984) 733 F.2d 646, 649).) Therefore, Plaintiff’s claim for municipal liability as against the  
25 municipal defendants fails to state a claim upon which relief can be granted.

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1           **C. Plaintiff's Complaint Fails to State A Claim Because It is Impermissibly**  
2           **Vague, Ambiguous and Conclusory**

3           **1. A Complaint for Civil Rights Violations Must be Sufficiently Clear**  
4           **and Direct to Allow Defendants to Frame an Appropriate Response**  
5           **and to Avoid Needless Discovery**

6           The basic pleading standard for civil rights complaints calls for inclusion of clear,  
7           factual allegations in support of each cause of action, and that such allegations are not  
8           vague or based on mere conclusions. (*Ivey v. Board of Regents* (9<sup>th</sup> Cir. 1982) 673 F.2d  
9           266; *Sherman v. Yaki* (9<sup>th</sup> Cir. 1977) 549 F.2d 1287, 1290.) Claims may be dismissed  
10          because they fail to allege sufficient facts to support any cognizable legal claim.  
11          (*SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.* (9<sup>th</sup> Cir. 1996) 88 F.3d 780, 783  
12          cert. denied, (1996) 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513.) While the Federal  
13          Rules require merely that the complaint place defendants on notice of what it is they are  
14          being sued for, a plaintiff's pleading obligations are not non-existent. On the contrary,  
15          plaintiffs must put forth a short, plain statement showing that they are entitled to relief.  
16          (FRCP Rule 8(a)(1).)

17          An impermissibly vague, ambiguous and conclusory complaint may be grounds for  
18          a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6). In *McHenry v.*  
19          *Renne*, the Court held that the district court did not abuse its discretion in dismissing the  
20          plaintiffs' third amended complaint for its lack of clarity, directness and relevance which  
21          made it "difficult to determine just what circumstances were supposed to have given rise to  
22          the specific causes of action." (*McHenry, supra.* at 1172, 1178.) The Court found that  
23          because the complaint did not contain a clear statement of claims and was confusing to  
24          read, it did not give defendants a fair opportunity to frame a responsive pleading. "One  
25          cannot determine from the complaint who is being sued, for what relief, and on what  
26          theory, with enough detail to guide discovery." (*Id.*)

27          In this case, plaintiff's "First Cause of Action" is labeled one of "Violation of Civil  
28          Rights." Plaintiff alleges merely, however, that some unspecified right guaranteed by the  
Federal Constitution has been violated:

By the actions described in the previous paragraphs, the defendants deprived the plaintiff of clearly established rights guaranteed by the United States Constitution. . . (Complaint, ¶26.)

As is apparent, plaintiff fails to identify a single provision of the U.S. Constitution he alleges defendants to have violated. This omission makes it impossible for defendants to frame a responsive pleading.

Not only is there ambiguity in the nature of the claims being asserted by plaintiff but the Complaint is also unclear as to which claims are being asserted against each particular Defendant. Plaintiff makes general allegations against *all* Defendants pertaining to violations of his federal constitutional rights. At a minimum, he should be compelled to specify which claims are being leveled against each Defendant.

**2. The Vague and Conclusory Language of the Complaint Deprives the Individual Defendant Police Officers of the Opportunity to Raise the Defense of Qualified Immunity**

The individual defendants in this civil rights case have the right to a clear understanding of the nature of the grievances suffered by plaintiff. Plaintiff's allegations must be sufficiently specific so that the individual defendants can assess the viability of raising qualified immunity defenses, and so that a judge can determine the appropriateness of such defenses. (*McHenry, supra*, 84 F.3d at 1175.)

In *Harlow v. Fitzgerald*, the Supreme Court established an objective test for qualified immunity, holding that “government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818, 102 S.Ct. 2727.) Such qualified immunity is immunity from suit. It is clear that the immunity afforded is “immunity from suit rather than a mere defense to liability.” (*Mitchell v. Forsyth* (1985) 472 U.S. 511, 526, 105 S.Ct. 2806.) Accordingly, the existence of qualified immunity “should be determined by the district court at the earliest possible point in the litigation.” (*Act Up!/Portland v. Bagley*, (9<sup>th</sup> Cir. 1993) 988 F.2d 868, 873); *McHenry, supra*, 84 F.3d at 1175.)

1        While Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain  
2 statement showing that the pleader is entitled to relief” (*Conley v. Gibson*, (1957) 355 U.S.  
3 41, 47, 78 S.Ct. 99 ), more than conclusory allegations are needed to give a defendant  
4 the requisite notice of the claim. (*Hatch v. Reliance Ins. Co.* (9<sup>th</sup> Cir. 1985) 758 F.2d 409,  
5 415.) Moreover, inferences cannot be accepted if they are unsupported by the alleged  
6 facts, nor can the court accept purely legal conclusions masquerading as factual  
7 allegations. (*Maljack Productions Inc. v. Motion Picture Ass'n of America, Inc.* (D.C. Cir.  
8 1995) 52 F.3d 373, 375; see also, *Fleming v. Lind-Waldock & Co.*, (1<sup>st</sup> Cir. 1990) 922 F.2d  
9 20, 23 (noting that each general allegation must be supported by a specific factual basis  
10 and pleadings are not sufficient where they rest on unsubstantiated conclusions).)

11        Without knowing what rights plaintiff alleges that defendants have violated,  
12 defendants cannot know whether they can raise a qualified immunity defense. The facts  
13 as pled are thus too vague to allow Defendants to raise the defense of qualified immunity  
14 under *Harlow v. Fitzgerald*. The Complaint therefore fails to state a claim upon which relief  
15 can be granted.

16        **D. Plaintiff's Complaint Fails to State a Valid Supplemental State Law Claim.**

17        Plaintiff's Second through Sixth “Causes of Action,” as well as portions of his First  
18 Cause, are premised on state law theories of battery, assault, intentional infliction of  
19 emotional distress, negligent infliction of emotional distress, conversion and violations of  
20 the state constitutional rights to violations of California Civil code Section 51.7. These  
21 claims must be dismissed for three reasons. First, because plaintiff's federal claims are  
22 flawed, this court is without jurisdiction to entertain their state law claims. Second, plaintiff  
23 has failed to file a timely tort claim, as required by the California Government Code.  
24 Finally, plaintiff has failed to articulate sufficient facts in support his state claims under his  
25 Third, Fourth and First Causes of Action.

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1           **1. This Court Lacks Jurisdiction to Entertain Plaintiff's Supplemental**  
2           **State Law Claims Because They Have Failed to State a Valid Cause of**  
3           **Action under Federal Law.**

4           Absent diversity jurisdiction, federal courts may adjudicate state law tort claims only if  
5           a federal question cause of action is properly before the court in the first instance.  
6           However, when original jurisdiction does not exist for the principal claim, federal courts  
7           may not exercise supplemental jurisdiction over the remaining state law claims. (*Randolph*  
8           *v. Budget Rent-A-Car* (9<sup>th</sup> Cir. 1996) 97 F.3d 319, 329). "Simply put, failure of original  
9           jurisdiction precludes application of supplemental jurisdiction." (*Id.* at 329 (emphasis  
added).)

10          Here, plaintiff's Complaint is based upon federal question jurisdiction. However, as  
11         demonstrated above, the complaint's federal claim is flawed and must be dismissed under  
12         Federal Rule of Civil Procedure 12(b)(6). With the dismissal of the federal claim, this Court  
13         lacks jurisdiction to hear the plaintiffs' state law claims.

14           **2. Even If this Court Retained Supplemental Jurisdiction Over Plaintiff's**  
15           **State Law Claims, These Claims Must Be Dismissed, as Plaintiff**  
16           **Failed to Comply with the California Tort Claims Act.**

17          The plaintiff has chosen to sue the City of Petaluma and its employees. Under the  
18         California Tort Claims Act, "no suit for money or damages may be brought against a public  
19         entity on a cause of action for which a claim is required to be presented. . . until a written  
20         claim therefor has been presented to the public entity and has been acted upon" by that  
21         public entity. (California Government Code § 945.4.) "There shall be presented. . . all  
22         claims for money or damages against local public entities. . ." (California Government  
23         Code § 905.) "The timely filing of a claim is an essential element of a cause of action  
24         against a public entity and failure to allege compliance with the claim statute renders the  
25         complaint subject to a general demurrer." (*Wood v. Riverside General Hospital* (1994) 25  
26         Cal.App.4th 1113, 1119, 31 Cal.Rptr.2d 8.)

27          Plaintiff's complaint requests "money or damages" from the City of Petaluma, a  
28         public entity. Further, his Complaint alleges that he filed his tort claim for assault, battery,  
            intentional infliction of emotional distress, negligent infliction of emotional distress,

1 conversion and violation of his state and federal civil rights on December 11, 2003. He  
2 fails to bring to this Court's attention, however, that his tort claim was rejected on  
3 **December 22, 2003.** (See, Notice of Rejection, Exhibit A to Defendants' Request for  
4 Judicial Notice.) By law, plaintiff is required to bring any lawsuit within **six months—**  
5 (California Government Code § 945.6)—**or in this case, no later than June 22, 2004.**  
6 Plaintiff filed his instant Complaint on July 2, 2004.<sup>1</sup> Because of his failure to file his state  
7 causes of action within the statutory limitations period, he is jurisdictionally barred from  
8 having the Court—any court—hear them. Accordingly, plaintiff's complaint fails to state a  
9 supplemental state cause of action against the City defendants, and his state law causes  
10 of action must be dismissed with prejudice.

11           **3. Even If this Court Retained Supplemental Jurisdiction Over Plaintiffs State**  
12           **Law Claim, They Are Fatally Flawed**

13           California Government Code section 815(b) provides that "except as otherwise  
14 provided by statute" a public entity is not liable for any injury, "whether such injury arises  
15 out of an act or omission of the public entity or a public employee or any other person." In  
16 other words, unless there exists a specific statute that operates to impose tort liability upon  
17 a public entity, no such liability can exist.

18           Further, according to subdivision (b) of Section 815.2 of the government code:

19           Except as otherwise provided by statute, a public entity is not liable for any  
20 injury resulting from an act or omission of an employee of the public entity  
where the employee is immune from liability.

21 Accordingly, liability for employee torts is limited by statutory immunities applicable to  
22 either the public entity (Gov. Code § 815(b)), or the public employee (Gov. Code §  
23 815.2(b)).

24  
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27           <sup>1</sup> Although there appears a Nunc Pro Tunc Order among plaintiffs' exhibits to his Complaint, (See Exhibit  
28 "C"), this Order appears unrelated to the case at bar, as the Order pertains to Sonoma County Superior  
Court Case No. SPR-75178, while his current Complaint was assigned Sonoma County Superior Court Case  
No. 235113. The Nunc Pro Tunc Order purports to allege that plaintiff's complaint should be file-stamped  
June 25, 2004, rather than July 2, 2004. Regardless of which date plaintiff chooses to use—June 25 or July  
2—he is still beyond the six month statute of limitations.

1 Plaintiff's Third and Fourth claims for Intentional of Emotional Distress and Negligent  
2 Infliction of Emotional Distress, respectively, are not statutory claims. There are no facts  
3 alleged to support these allegations. In fact plaintiffs have not even identified which  
4 defendants inflicted emotional distress on them, when it was inflicted or how it was  
5 inflicted.

6 Further, plaintiff's "First Cause of Action" seeks relief under California Civil Code §  
7 51.7. This statute is not applicable to the facts alleged in this lawsuit. Section 51.7 states  
8 that all persons in this state have a right to freedom from violence or intimidation  
9 committed because of their "race, color, religion, ancestry, national origin, political  
10 affiliation, sex, sexual orientation, age, disability or position in a labor dispute." Plaintiff has  
11 not alleged that any of these particular characteristics are at issue.

12 Plaintiff's inclusion of this provision is indicative of the inadequate approach they have  
13 taken in this case. Their supplemental state claims in the First, Third and Fourth Causes  
14 of Action have no merit. They are factually and legally untenable and they should be  
15 dismissed.

16 **VII. CONCLUSION**

17 The City defendants respectfully request that plaintiff's complaint be dismissed in its  
18 entirety. Plaintiff fails to adequately plead a cause of action under Section 1983. Further,  
19 he fails to allege facts necessary to maintain a *Monell* claim. Finally, plaintiff is  
20 jurisdictionally barred from suing any of the City defendants for state law claims because of  
21 his failure to timely file suit within six months of receiving a rejection of his tort claim.

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Alternatively, the City defendants respectfully request that plaintiff be made to file an amended complaint which coherently fulfills his pleading obligations.

Dated: September 13, 2004 Respectfully submitted,

MEYERS, NAVÉ, RIBACK, SILVER & WILSON

By: \_\_\_\_\_

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1  
2  
3 TABLE OF CONTENTS  
4  
5

6 Page(s)  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I.	NOTICE OF MOTION .....	1
II	RELIEF SOUGHT .....	1
III.	INTRODUCTION .....	2
IV.	STATEMENT OF FACTS .....	3
V.	ISSUES PRESENTED .....	3
IV.	ARGUMENT .....	4
A.	The Complaint Fails to State a Claim for Which Relief Can Be Granted Under 42 U.S.C. Section 1983 .....	4
B.	The Complaint Fails to State a Valid Cause of Action for Municipal Liability .....	5
1.	Plaintiff Cannot Hold the City, Chief Simms and the City's named Officers Liable Under § 1983 Based on Respondeat Superior .....	5
a.	Under Section 1983, Municipalities Are not Vicariously Liable For the Constitutional Torts of Their Employees.....	6
b.	Plaintiff's Complaint Fails to Articulate the "Custom, Policy or Practice" by the municipal defendants which deprived him of his Constitutional Rights .....	6
C.	Plaintiff's Complaint Fails to State A Claim Because It is Impermissibly Vague, Ambiguous and Conclusory .....	8
1.	A Complaint for Civil Rights Violations Must be Sufficiently Clear and Direct to Allow Defendants to Frame an Appropriate Response and to Avoid Needless Discovery.....	8
2.	The Vague and Conclusory Language of the Complaint Deprives the Individual Defendant Police Officers of the Opportunity to Raise the Defense of Qualified Immunity .....	9
D.	Plaintiff's Complaint Fails to State a Valid Supplemental State Law Claim 10	
1.	This Court Lacks Jurisdiction to Entertain Plaintiff's Supplemental State Law Claims Because They Have Failed to State a Valid Cause of Action under Federal Law.....	11

1  
2                   TABLE OF CONTENTS (*continued*)  
3

	Page(s)
2. Even if this Court Retained Supplemental Jurisdiction Over Plaintiff's State Law Claims, These Claims Must Be Dismissed, as Plaintiff Failed to Comply with the California Tort Claims Act .....	11
3. Even If this Court Retained Supplemental Jurisdiction Over Plaintiffs State Law Claim, They are Fatally Flawed .....	12
VII. CONCLUSION.....	13

1 TABLE OF AUTHORITIES  
23 Page(s)  
45 Cases  
6

7	<i>Act Up!/Portland v. Bagley</i> 8 988 F.2d 868, 873 (9th Cir. 1993) .....	9
9	<i>Albright v. Oliver</i> 10 510 U.S. 266 (1994).....	5
11	<i>City of Los Angeles v. Heller</i> 12 475 U.S. 796 (1986).....	7
13	<i>City of St. Louis v. Praprotnik</i> 14 485 U.S. 112, 127 (1989).....	7
15	<i>Conley v. Gibson</i> 16 355 U.S. 41, 47, 78 S.Ct. 99 (1957).....	9
17	<i>Fleming v. Lind-Waldock &amp; Co.</i> 18 922 F.2d 20, 23 (1st Cir. 1990) .....	10
19	<i>Gillette v. Delmore,</i> 20 979 F.2d 134 (9 <sup>th</sup> Cir. 1992) .....	6
21	<i>Graham v. Connor,</i> 22 490 U.S. 386 (1989).....	5
23	<i>Harlow v. Fitzgerald</i> 24 457 U.S. 800, 102 S.Ct. 2727 (1982) .....	9, 10
25	<i>Hatch v. Reliance Ins. Co.</i> 26 758 F.2d 409 (9th Cir. 1985) .....	10
27	<i>Ivey v. Board of Regents,</i> 28 673 F.2d 266 (9th Cir. 1982) .....	8
29	<i>Jones v. Community Redevelopment Agency</i> 30 733 F.2d 646 (9th Cir. 1984) .....	7
31	<i>Maljack Productions Inc. v. Motion Picture Ass'n of America, Inc.</i> 32 52 F.3d 373 (D.C. Cir. 1995) .....	10

1 TABLE OF AUTHORITIES (*continued*)  
2  
3

	Page(s)
4 <i>McHenry</i> , 5 <i>supra</i> . at 1172 .....	8
6 <i>Medrano v. City of Los Angeles</i> 7          973 F.2d 1499 (9th Cir. 1992) .....	6
8 <i>Mitchell v. Forsyth</i> 9          472 U.S. 511, 105 S.Ct. 2806 (1985) .....	9
10 <i>Monell v. New York City Dep't of Social Servs.</i> 11     (1978) 436 U.S. 658 .....	6, 13
12 <i>Moor v. County of Alameda</i> 13     411 U.S. 693, 93 S.Ct. 1785 (1973) .....	6
14 <i>Price v. State of Hawaii</i> 15     939 F.2d 702 (9th Cir. 1991) .....	7
16 <i>Randolph v. Budget Rent-A-Car</i> 17     97 F.3d 319 (9th Cir. 1996) .....	11
18 <i>Sherman v. Yaki</i> 19     (9 <sup>th</sup> Cir. 1977) 549 F.2d 1287 .....	4, 8
20 <i>SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.</i> 21     (9 <sup>th</sup> Cir. 1996) 88 F.3d 780, (1996) 519 U.S. 1028, 117 S.Ct. 583 .....	8
22 <i>Thompson v. City of Los Angeles</i> 23     885 F.2d 1439 (9th Cir. 1989) .....	6
24 <i>Wood v. Riverside General Hospital</i> 25     25 Cal.App.4th 1113, 31 Cal.Rptr.2d 8 (1994). ....	11

1 TABLE OF AUTHORITIES (*Continued*)  
2

3  
4 Page(s)  
5

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**Statutes**

California Government Code	
42 U.S.C. § 1983.....	5
§ 815(b).....	12
§ 900 .....	2
§ 905 .....	11
§ 945.....	12
§ 945.4 .....	11

10 Federal Rule of Civil Procedure

12(b)(6) .....	1, 4
----------------	------

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**Other Authorities**

Welfare & Institutions Code	
§5150 .....	2